

State Notes

TOPICS OF LEGISLATIVE INTEREST

May/June 2006



Massachusetts' Approach to Health Insurance Reform **By David Fosdick, Fiscal Analyst, and Steve Angelotti, Fiscal Analyst**

This past April, after a lengthy negotiation between Governor Mitt Romney and the Massachusetts General Court, legislation that will significantly modify the structure of health care in the Commonwealth of Massachusetts was enacted. The expressed goal of this health care reform effort is to ensure insurance coverage for every citizen in the Commonwealth. This article will provide a summary of the reform plan, describe some of the advantages and disadvantages of the Massachusetts approach, and make some observations on the applicability of this plan to the State of Michigan.

General Description

The most significant element of the Massachusetts reform effort is the creation of an individual insurance mandate. Massachusetts will require that all Commonwealth residents have health insurance by July 1, 2007; proof of coverage will be a required element of state income tax filings. Uninsured residents with access to affordable health insurance will be forced to pay financial penalties, beginning with the loss of the personal tax exemption for a first violation with increasing fines for subsequent violations.

Massachusetts will create an independent public authority to serve as a conduit between insurers and small businesses or uninsured residents seeking coverage options. The authority, known as the Commonwealth Health Insurance Connector, will establish quality standards for insurance products offered to these populations and then sell plans to individuals and businesses in need of insurance coverage. The Connector also will manage the premium contributions made by employers and covered enrollees. The establishment of this authority will permit multiple employers to contribute toward an individual's health care and make health coverage purchased through the Connector portable from job to job.

Individuals with income under 300% Federal poverty level (FPL) seeking insurance coverage through the Connector will be eligible for a premium assistance program known as Commonwealth Care. The extent of premium aid granted to each enrollee will be based upon a sliding scale tied to income. Individuals with incomes below 100% FPL will be provided a basic benefit plan and will receive a full premium subsidy through Commonwealth Care.

Massachusetts also will increase Medicaid eligibility to help low-income residents fulfill the insurance mandate. The upper-income level for children eligible for Medicaid will be increased from 200% FPL to 300% FPL. The Commonwealth also will expand its outreach activities to identify children and adults currently eligible for Medicaid coverage. In addition, the reform effort envisions an increase in Medicaid reimbursement to hospitals and physicians over the next three years.

Modifications are made to private insurance regulation in an attempt to make insurance more readily available. The state will merge the nongroup and small-group markets, leading to a decrease in premium cost. Insurers will be permitted to create an insurance product specifically targeted to 19- to 26-year-olds (offered through the Connector) at a lower cost.



Parents will be permitted to keep their children, up to age 25, on their insurance for two years after the children lose dependent status.

One of the more controversial aspects of the Massachusetts health reform effort is related to what are termed "employer responsibility" elements of the plan. Governor Mitt Romney vetoed several provisions related to employer participation but his veto was overridden by the Legislature. Businesses with 10 or more employees that do not provide health insurance must make a "fair share" payment to the Commonwealth of \$295 per employee per year. Employers that do not offer insurance also may be liable for a "free rider surcharge" imposed by the Commonwealth. This surcharge may be triggered if an uninsured employee has obtained free care more than three times during a year or if more than one employee from an individual firm has obtained free care more than five times during a year. The surcharge may range from 10.0% to 100% of the state's cost of providing care to these employees, exempting the first \$50,000 in cost.

The Massachusetts plan also mandates that each employer with more than 10 employees that does not offer insurance make Section 125 plans (also known as cafeteria plans) available to employees. Section 125 plans permit employees to purchase health insurance and other health products using pre-tax dollars.

Massachusetts estimates that the total cost of this effort will be about \$1.2 billion over the next three years. A significant portion of this cost will be covered through funds previously granted through the Medicaid program to safety net hospitals and dollars allocated to a fund to reimburse medical providers for uncompensated care. Additionally, revenue generated through "fair share" payments by employers and about \$300 million in general fund money will be used to help finance the project. Massachusetts assumes no general fund need after the initial three years of operation of this program.

Advantages

The Massachusetts approach is comprehensive in its design. The reform proposal recognizes the role that private insurance regulation, tax policy, and individual financial incentives play in increasing the number of uninsured individuals. Attempts to overcome these hurdles to greater insurance market participation may have greater potential for increasing the number of insured residents than just creating a state-subsidized health insurance program would have.

The Massachusetts approach is also proactive. The Commonwealth largely finances this plan with Medicaid funds that previously were allocated to providers who treated a disproportionate share of patients who were uninsured or enrolled in the Medicaid program. These funds will now be used to ensure that a much larger proportion of individuals seeking care are insured and that Medicaid payment rates are competitive.

The creation of the Connector also provides advantages to Massachusetts. The authority should decrease administrative cost to small business associated with contracting with a health insurer. The Connector also will permit the Commonwealth to pool residents entering the individual health insurance market, generating cost savings and increasing insurance



market participation. Linking insurance products purchased through the Connector to Section 125 plans, which will permit employees to purchase insurance using pre-tax dollars, makes insurance more affordable to residents who do not have access to employer-provided health coverage.

Disadvantages

The creation of an individual insurance mandate is a unique approach to ensuring health insurance participation, but this concept does present several significant problems. One element of the insurance mandate that seems problematic is the cost that could be imposed upon certain Massachusetts residents. These cost problems are overcome, to a large extent, through expansion of the Medicaid program and the creation of a state-sponsored premium assistance program. For individuals who do not qualify for these programs, however, this requirement will impose a financial burden. The creation of this cost for middle-income individuals without access to employer-sponsored insurance may make Massachusetts a less desirable place to reside.

The structure of the financial penalties for noncompliance with the insurance mandate also may lead to some difficulties. The fines levied on uninsured residents with access to coverage are well below the actual cost of an insurance policy. For example, the loss of the personal tax exemption for a single individual making \$30,000 a year is about \$190. The financial penalty for this individual of less than \$200 would be far cheaper than the cost of a health insurance policy. Residents who are not interested in purchasing coverage, specifically young people facing premiums much higher than expected health care costs, may likely find it preferable just to pay the fines.

The Massachusetts system also might increase the cost of providing insurance in the long run. Greater state influence upon the structure of health insurance packages will provide a target to lobbyists and advocates seeking to expand coverage to favored procedures and products. This problem has been anticipated, in the short run, with the imposition of a moratorium on changing benefits until 2008, but is still an issue that may need to be included in long-run cost projections.

Applicability to Michigan

The Commonwealth of Massachusetts in crafting this proposal took advantage of several circumstances unique to that state. The most significant of these circumstances is access to funds previously spent to provide care for the uninsured. Massachusetts previously had devoted several hundred million dollars for safety net providers through a free care pool and through enhanced payments to several urban hospital systems. Reprogramming these Medicaid funds provides the lion's share of the funding devoted to the Massachusetts program. Michigan does not have access to similar flexible fund sources to finance a comparable program.

It should be noted that the State of Michigan is in negotiation with the Federal government about the structure of a potential waiver application that would request Federal matching funds for current State efforts to support the uninsured. If granted, this waiver would provide

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about \$1.0 billion in Federal funding to finance a health insurance benefit available to low- and moderate-income uninsured residents of the State.

The Massachusetts legislation uses a number of strategies to achieve greater insurance market participation. While it is not likely that any other state could follow the precise strategy included in the Massachusetts plan, each state may find some element of this legislation useful in improving insurance access. The most significant element in the Massachusetts plan, the individual insurance mandate, is probably not viable in Michigan at this time. Michigan would need to find additional venues for low- and moderate-income residents to obtain low-cost health coverage, and probably expand Medicaid eligibility before an insurance mandate would be feasible. If a mandate were imposed without these elements, it would represent a significant financial burden to a large number of residents in this State.

Other elements of the Massachusetts legislation, especially the concept of a health insurance "connector", may provide some possibilities in Michigan. The connector could be used to reduce the cost of individual health policies by pooling uninsured individuals. The use of Section 125 plans by employers that do not offer insurance to employees also could provide marginal cost savings to individuals looking to purchase their own coverage.

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Violent Video Games: Danger to Children or Protected Free Speech? **By Patrick Affholter, Legislative Analyst**

In 2005, in response to concerns that violent video games may incite aggressive behavior in children, the Legislature passed and the Governor signed legislation to prohibit the dissemination to minors of “ultra-violent explicit video games” that are harmful to minors. Before the bill’s effective date of December 1, 2005, the United States District Court issued a temporary injunction prohibiting the legislation from taking effect. In March 2006, that Court granted summary judgment in favor of the parties challenging the new law and permanently enjoined Public Act 108 of 2005 as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This article will describe the 2005 legislation and examine the ruling of the U.S. District Court.

Public Act 108 of 2005

Prohibitions

On September 14, 2005, Governor Jennifer Granholm signed into law Senate Bill 416, which became Public Act 108 of 2005. The Act added Part II (Ultra-Violent Explicit Video Games) to Public Act 33 of 1978, which prohibits disseminating, exhibiting, or displaying sexually explicit matter to minors.

Under Public Act 108, a person may not knowingly disseminate to a minor (a person under 17 years of age) an ultra-violent explicit video game that is harmful to minors. A person who violates that prohibition is responsible for a State civil infraction and subject to a civil fine of up to \$5,000. If the violator has one prior determination of responsibility for that State civil infraction, he or she is subject to a civil fine of up to \$15,000. If the violator has two or more prior determinations of responsibility, the maximum civil fine is \$40,000. In imposing the fine for a third or subsequent violation, the court must consider the scope of the defendant’s commercial activity in disseminating ultra-violent explicit video games to minors.

The dissemination prohibition does not apply to the dissemination of an ultra-violent video game to a minor by any of the following: a parent or guardian who disseminates the game to his or her child or ward; an immediate family member of the minor who disseminates an ultra-violent explicit video game to the minor in the immediate family member’s residence or the minor’s residence; an individual who disseminates an ultra-violent video game to a minor who is a guest in the individual’s residence; or an individual who disseminates an ultra-violent explicit video game for a legitimate medical, scientific, governmental, or judicial purpose.

Public Act 108 also prohibits a person from knowingly making a false representation that he or she is the parent or guardian of a minor, or that a minor is 17 or older, with the intent to facilitate the dissemination to the minor of an ultra-violent explicit video game that is harmful to minors. A violation is a misdemeanor punishable by up to 93 days’ imprisonment, a maximum fine of \$15,000, or both.



In addition, a person who possesses managerial responsibility for a business enterprise renting or selling ultra-violent explicit video games that are harmful to minors may not knowingly permit a minor who is not accompanied by a parent or guardian to play or view the playing of an ultra-violent explicit video game that is harmful to minors. A violation is a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$25,000, or both.

Public Act 108 spells out the conditions under which a person knowingly disseminates an ultra-violent explicit video game to a minor and knows the nature of the video game and the status of the minor. It also includes an affirmative defense to an alleged violation for a person acting in good faith, and outlines the conditions for acting in good faith.

Statutory Definitions

Under the 2005 legislation, "disseminate" means to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to sell, lend, give, exhibit, show, or allow to examine.

"Ultra-violent explicit video game" means a video game that continually and repetitively depicts extreme and loathsome violence. "Extreme and loathsome violence" means real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings, including actions causing death, inflicting cruelty, dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts, murder, criminal sexual conduct, or torture.

"Harmful to minors" means having the following characteristics:

- Considered as a whole, appeals to the morbid interest in asocial, aggressive behavior of minors as determined by contemporary local community standards.
- Is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
- Considered as a whole, lacks serious literary, artistic, political, educational, or scientific value for minors.

"Morbid interest in asocial, aggressive behavior" means a morbid interest in committing uncontrolled aggression against an individual. In determining whether an ultra-violent explicit video game appeals to this interest, the video game must be judged with reference to average 16-year-old minors. If it appears from the character of the video game that it is designed to appeal to this interest of a particular group of persons, then the video game must be judged with reference to average 16-year-old minors within that particular group.

Legislative Findings

Public Act 108 includes several legislative findings. The Act provides that, in light of Article IV, Section 51 of the State Constitution (which declares that the public health and general welfare of the people of Michigan are matters of primary public concern, and requires the Legislature to pass suitable laws for the protection and promotion of the public health), and "after hearing from expert witnesses and law enforcement officials, considering the testimony



of expert witnesses before other legislative bodies, and reviewing dozens of studies and metastudies of hundreds of studies, the legislature finds all of the following:

- (a) Published research overwhelmingly finds that ultra-violent explicit video games are harmful to minors because minors who play ultra-violent explicit video games are consistently more likely to exhibit violent, asocial, or aggressive behavior and have feelings of aggression.
- (b) Spokespersons for not less than 6 major national health associations have concluded and testified that after reviewing more than 1,000 studies, the studies 'point overwhelmingly to a causal connection between media violence and aggressive behavior in some children', concluding that the effects of media violence on minors 'are measurable and long-lasting'.
- (c) Law enforcement officers testified that recent statewide targeted enforcement efforts reveal that minors are capable of purchasing, and do purchase, ultra-violent explicit video games.
- (d) Law enforcement officers testified about cases of minors acting out ultra-violent explicit video game behaviors by victimizing other citizens.
- (e) The state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors.
- (f) The state has a legitimate and compelling interest in preventing violent, aggressive, and asocial behavior from manifesting itself in minors.
- (g) The state has a legitimate and compelling interest in directly and substantially alleviating the real-life harms perpetrated by minors who play ultra-violent explicit video games."

Entertainment Software Association, et al. v Granholm, et al.

In this case, decided on March 31, 2006, the U.S. District Court for the Eastern District of Michigan ruled Public Act 108 of 2005 unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and issued a permanent injunction against the Act's enforcement (Case No. 05-73634).

The plaintiffs in the case claimed that Public Act 108 violates the U.S. Constitution's protection of free speech, equal protection, and due process and that it is unconstitutionally vague. The Court granted a preliminary injunction on November 9, 2005, enjoining enforcement of the Act before it was scheduled to take effect. The plaintiffs then filed a motion for summary judgment to invalidate the Act as an unconstitutional violation of free speech under the First and Fourteenth Amendments to the U.S. Constitution. The defendants also moved for summary judgment that the Act did not violate free speech, was not unconstitutionally vague, and was tailored narrowly to promote a compelling State interest.

The Court determined that video games are protected free speech. It opined that the games "contain original artwork, graphics, music, storylines, and characters similar to movies and television shows, both of which are considered protected free speech". While the defendants conceded that the expressive element in video games is fully protected by the First Amendment free speech rights, they argued that "the interactive functional element, which is



not present in other forms of electronic media, can be distinguished and should not be considered protected speech". According to the Court, that argument failed to consider the interactive nature in other forms of entertainment media and "it would be impossible to separate the functional aspects of a video game from the expressive, inasmuch as they are so closely intertwined and dependant on each other in creating the virtual experience".

The Court held that "video games contain creative, expressive free speech, inseparable from their interactive functional elements, and are therefore protected by the First Amendment". Next, the Court had to determine whether Public Act 108 violates the First Amendment. The Court found that video game producers do not intend for the consumers to commit violent actions and the State's research failed to prove that video games ever caused anyone to commit a violent act.

The Court also found that the defendants' reliance on a joint statement of various medical associations that violent video games have a negative impact on minors fell short of "substantial evidence" of the State's compelling interest in protecting minors. The Court said that the position taken in the joint statement by the American Medical Association, the American Pediatric Association, and the American Psychological Association "is not based on any scientific study, but appears to represent the policy or political views of their governing bodies". The Court concluded that "this falls far short of the 'substantial evidence' requirement needed to restrict free speech" and "it cannot be said that the legislature enacted the law using 'reasonable inference' from scientific literature based on 'substantial evidence'."

Further, the Court ruled that the Act does not materially advance the Legislature's stated goals because it "fails to regulate other comparable forms of violent media from minors" and "it appears to discriminate against a disfavored 'newcomer' in the world of entertainment media". In addition, since the Act would make the retailers responsible for the determination of which games were considered "ultra-violent", the Court suggested that retailers would be likely to "steer clear of any game with the potential of such violence in order to avoid criminal liability, thus denying constitutionally protected free speech to minors and adults".

The Court also ruled that Public Act 108 is unconstitutionally vague under the Fourteenth Amendment. It held that the "lack of precision" in the definitions of various terms used in the legislation "will subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers", causing them either to self-censor or otherwise restrict access to video game titles that were potentially offensive. The Court also remarked that game designers likely would make a greater attempt to avoid certain types of games than if the illegal content boundaries were more clearly marked. This behavior, in turn, would deprive access to protected First Amendment expressions by adults, as well as minors.

The Court concluded that Part II, as enacted by Public Act 108, is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution, and converted the previously ordered preliminary injunction into a permanent injunction.



Responses to the Court Ruling

In the aftermath of the ruling handed down by the U.S. District Court, the Governor expressed disappointment at the outcome of the case and the sponsor of the legislation urged the Governor and Attorney General to appeal the decision.

On the other hand, an April 6, 2006, *Detroit Free Press* editorial urged the Governor not to pursue an appeal or new legislation, but to focus on public education and working voluntarily with retailers toward self-regulation. The editorial characterized Public Act 108 as “a bad idea from the start” and suggested that an appeal or reintroduction of similar legislation would be a waste of time and money. Also, according to an April 5, 2006, *Lansing State Journal* article, Federal courts have struck down video game bans in Washington state, Indianapolis, and St. Louis County, Missouri, because the bans encroached on First Amendment rights (“Senator says ‘science’ backs need to restrict video games”). According to the Department of Attorney General, the State is not appealing the granting of the permanent injunction.

Supporters of restrictions on minors’ access to violent video games, however, continue to claim that scientific research and studies back their contention that the games are dangerous to children and influence aggressive behavior. They also contend that the voluntary rating system used for video games is meaningless because of a lack of enforcement. According to the *Lansing State Journal* article, an undercover survey conducted in April 2005 by the Governor’s Office found that children were able to buy adult-rated video games in nearly half the stores investigated in six Michigan counties.

Meanwhile, controversial violent video games continue to be produced and marketed. In a syndicated column published in the *Detroit Free Press* on June 6, 2006, *Miami Herald* columnist Leonard Pitts Jr. decried a video game created last year called “Super Columbine Massacre RPG”. This game allows players to simulate roaming the hallways of Columbine High School in the roles of Columbine High School killers Dylan Klebold and Eric Harris (“Real-life death makes sick choice for video game”).